No. 8306.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO.),

Claimant and Appellant,

THE JAPANESE MOTORSHIP "KOYEI MARU", her motors, tackle, apparel and furniture,

Respondent,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Libelant and Appellee.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO., LTD.),

Libelant and Appellant,

vs.

THE AMERICAN TUG "DAVID P. FLEMING", her motors, tackle, apparel and furniture, etc., and THE SCOWS P. S. B. & D. CO. NO. 13, PIONEER NO. 11 and W. T. CO. NO. 14,

Respondents,

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Claimant and Appellee.

PACIFIC VEGETABLE OIL CO., INC., a corporation, and five others, owners and consignees of cargo laden on board the Japanese Motorship "KOYEI MARU",

Libelants and Appellants,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Respondent and Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Presiding Judge and Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

WILMINGTON TRANSPORTATION COMPANY, owner and operator of the tug "DAVID P. FLEMING", respectfully petitions for modification of the judgment entered herein by the opinion filed May 3, 1938, and earnestly requests a rehearing of this cause.

The opinion affirms the decree of the trial court as to the fault of the "KOYEI MARU" but reverses as to the lack of fault of the "FLEMING", ordering a mutual fault decree between these vessels and an interlocutory decree in favor of the owners of cargo on the "KOYEI MARU".

The decision against the "FLEMING" is based upon two findings of fault:

> (1) That the jetty construction to which barges supplied stone from Catalina Island permitted a continuous use of the barges between the island and the jetty if they passed the harbor in the daylight of late afternoon and early morning, and that the "FLEMING" with its tow was conducting an operation unnecessarily dangerous to vessels emerging from Los Angeles Harbor.
>
> (2) That the "FLEMING'S" conceded violation of the International Rules in exposing astern a range light which should have been screened to cast its light only forward of two points abaft the beam, confused the "KOYEI MARU'S" navigator, and that the Court could not find this confusion did not contribute to the collision.

We respectfully urge that if the first ground of decision becomes the law of the Ninth Circuit it condemns essential maritime towing operations which have been conducted day in and day out for many years and which towboat operators should be permitted to continue without fear that they are thereby engaging in operations negligent *per se*.

We also respectfully urge that under the facts established, and conceded by all parties, the confusion of the "KOYEI MARU'S" navigator could not have contributed to the collision, and indeed, on the contrary, helped minimize the effect of the collision.

We therefore request reconsideration of both these findings and rehearing herein.

POINT ONE.

There are many reasons why the towing of barges to and from Catalina Island is done at night. This has been done for years, is still going on today and is an important maritime operation in Southern California.

We respectfully desire to point out that there is no testimony in the record to support the statement in the opinion:

> "It was admitted that the jetty construction, to which the barges supplied stone from Catalina Island permitted a continuous use of the barges between the Island and the jetty if they passed the Harbor in the daylight of late afternoon and early morning."

We believe the Court may have obtained this impression from statements of counsel made during oral argument. If so, we fear this is a matter of misunderstanding.

The following facts are common knowledge:

(1) Weather conditions are better for towing at night in Catalina Channel. Except during storms, the weather is uniformly better at night than by day, which is important in successful towing of long tows.

(2) There is less traffic at night than by day. In the opinion, the Court suggests the tows could have been made to leave or arrive in the daylight of late afternoon and early morning. Early morning is the time when most vessels arrive at Los Angeles Harbor, the majority timing arrival to go through quarantine as soon as possible after daybreak. Late afternoon is the most common time of departure.

(3) The barges must be loaded at Catalina and discharged at the jetty in *daylight,* which necessitates night towing in order to assure arrivals during the

day with sufficient remaining daylight hours for handling the loads. If barges were towed only by day they would have to be tied up all night awaiting daylight hours to load or discharge, thus nearly doubling time required for equipment and greatly increasing the amount of equipment needed and the expense involved.

(4) Night towing across Catalina Channel has been going on for many years during building of the various breakwaters at Los Angeles, Long Beach and Santa Monica.

(5) It is absolutely essential in order to reach Catalina Island from Los Angeles Harbor to go out through the entrance of the channel because of the breakwater. At the time of the collision the channel entrance was much wider than it is now but tows must and do use it as it is today. This is the only means of ingress or egress.

The trial court carefully considered the question whether the tug and tow constituted a menace to navigation and substantial oral arguments were addressed on this point. The trial court pointed out in the oral decision that it believed a tow of one-half a mile in length is a menace, more or less, to navigation, but held that it is not the business of the courts to make regulations to prohibit well-known activities which have been conducted for many years.

There have been numerous decisions holding that the use of long tows is customary and proper, the only requirement being that those conducting such tows must use extreme care.

In the *H. M. Whitney,* 86 Fed. 697, at 700, the Court held:

> "In view of the testimony, we are not prepared to say that the towing hawsers used by this flotilla were too long, nor that it is improper navigation to tow the barges 'tandem', or to tow more than one at a time. That there cannot, even under the most favorable circumstances, be the same control exercised over such a flotilla as over a vessel moving under her own power, is self-evident. So, too, is the proposition that, the longer a vessel or a flotilla is, the more space she will require to maneuver in. Still, it is not for the courts to forbid the use of public waterways by long tows, however great a menace they may be to navigation, when the authorities whose function it is to regulate navigation in such waterways allow them. We had the question of towing on a long hawser through Hell Gate before us in The Josephine B., 7 C. C. A. 498, 58 Fed. 813, and held that, in the absence of any special regulations on the subject, the practice, which was shown to be a common one, was not to be condemned on the evidence there adduced. The court of appeals in the First Circuit had the question of a single tow on a long hawser, and used this language: 'It is beyond the province of the courts to condemn a practice so notorious and so long-continued that it must be presumed to be known to congress and to the supervising inspectors, and yet has not been condemned by either of them.' "

In *The Patience,* 167 Fed. 855, at 860, the Court held:

> "* * * Nor does the question of length of the tow seem to enter into the matter. If the tow had been shorter, the signals of the Patience and the signals of the Aransas might more easily have been heard by each other. If the hawser to the Glendower

had been longer, the boats might have cleared. But the length of the tow only puts upon the towboat the responsibility of greater caution, and the cases cited (The Gladiator, 79 Fed. 445, 25 C. C. A. 32, The Harold (D.C.) 84 Fed. 698, and The Whitney (D.C.) 77 Fed. 1001, affirmed 86 Fed. 697, 30 C. C. A. 343) while criticising long tows in such waters and in this very locality, do not attempt to make the use of long towing hawsers negligence, unless the length of the tow enters into the happening of the accident. Here the length of the tow, or the number of boats ahead of the Indian Ridge in the tow, had nothing to do with the matter."

In *The Domingo De Larrinaga,* 172 Fed. 264, a collision occurred in New York Harbor between a steamer going out to sea and a schooner, which, together with a barge, was on tow behind a tug. The collision occurred at night when the steamer failed to distinguish the light on the schooner. The Court held at page 267:

"As to the length of hawsers, a comparatively difficult question presents itself. A vessel using hawsers of such a length in towing through the narrow channels of New York Harbor is bound to use the greatest caution, and must be held responsible for any accident that is caused directly from the unnecessary length of the tow, and must follow such course as not to impede navigation more than would be the case if shorter towing lines were in use, unless extraordinary conditions of storm or danger compel the maintenance of the long tow lines, and in such time of storm or danger the care of the tug must be measured by the conditions which exist. In the present instance no particular danger was present. The Luckenbach merely considered it safer to keep the barges far apart than close together, but must therefore be held

for any accident which was occasioned merely by the length of the tow, or by the inability of the boats to follow in the proper course.

"On the evidence as a whole, however, it does not seem that in the present case either the length of the tow or the course followed by the tug affected the situation. *The Larrinaga was able to observe the tow at all times, to make out the signals of the Wade indicating that she was in tow,* and to avoid the difficulty which evidently presented itself in making the turn into Gedney's Channel. *She used no care in so doing, and whether she mistook the position of the Wade, or assumed that she was not in tow, or whether she was unable to prevent intersecting the path of the tow by the course which, under her own momentum and velocity, she was compelled to take, makes no difference.* The evidence indicates that the accident could have been avoided by the Larrinaga with due care and a proper appreciation of the situation; and under such circumstances, while the use of such long towlines cannot be commended or countenanced, nevertheless their presence, unless contributing to the accident, should not be made the basis of merely punitive damage."

We can find no authority holding it to be negligence *per se* merely to tow a long tow through frequented waters, either by day or by night. There are no regulations in the International, Inland or other Rules of the Road to this effect.

Many long tows are made requiring several days. For example, large log rafts are commonly towed along the Pacific Coast, and particularly in navigable rivers, and sometimes require days and weeks of continual towing in fair weather and fog to reach destination. Large oil barges

are also towed up and down the Pacific Coast almost daily. The usages of commerce require such activity. The reports contain hundreds of cases involving tows of varying lengths, some as long as 3,000 or 4,000 feet.

It is undoubtedly true that it would be safer if airplanes did not fly or take off or land at landing fields at night. But is it negligence *per se,* when they do so?

So long as Congress has not declared it unlawful to tow long tows either by day or night, whether through or near the entrance to harbors or elsewhere, we submit it places too great a burden on commerce if the courts of the United States declare that such practice in and of itself is negligence. This, we respectfully submit, is the effect of the opinion in this case. We have been unable to find any other case which goes so far.

As we read the opinion, the finding of the Court on this point is not based upon some failure on the part of Wilmington Transportation Company to exercise due care in making the tow. On the contrary, the record shows that Wilmington Transportation Company did everything it possibly could do to exercise reasonable care—in fact it took extraordinary precautions in ascertaining from the United States Steamboat Inspectors just what kind of lights to carry [Connor, 320; Fleming's Exhibit No. 15], in purchasing such lights especially for the work [Connor, 323] and in arranging for Notice to Mariners to be sent out by the United States Hydrographic Office [Connor, 325; Fleming's Exhibit No. 7].

We sincerely urge that the opinion be modified in respect of this finding.

POINT TWO.

The opinion points out that the only defect in the "FLEMING'S" lights observable by the "KOYEI MARU" was the fact that the range light showed all around the horizon. Had it been properly screened two points abaft the beam, it would have been out of range, as was the green light.

In such event, the "KOYEI MARU" would have seen only the stern light of the "FLEMING".

The opinion finds that the "KOYEI MARU'S" master first saw the "FLEMING'S" lights on his right bow as a blur of light at 2:04. It was not until this blur resolved itself into two lights at 2:06 (at substantially the same moment the first tow loomed up ahead described as a "dark object") that the "KOYEI MARU" reversed and changed her helm.

Now, if we assume that at 2:06 the tug showed only her stern light there would, on Captain Watanabe's own story, have been nothing to warn (or confuse) the "KOYEI MARU'S" master other than the stern light and the "dark object". How can it be said that the "KOYEI MARU" would have done anything more than she did do if she had seen only a stern light? Is it not obvious that in the *absence* of the range light the master of the "KOYEI MARU" would have had *less* reason to order full astern at 2:06? In such event the first barge would probably have been struck head-on with far greater damage. Certainly the absence of sight of the range light could not possibly have assisted in any way to avoid the crossing of the course of the tug and tow by the "KOYEI MARU". It could only make a difference as to what *portion* of the tow the "KOYEI MARU" struck.

We respectfully urge that it cannot fairly be held that if the range light had not been seen the "KOYEI MARU"

would have done something she did not do to avoid collision.

It is necessary in this connection to bear in mind the engine movements of the "KOYEI MARU" [Yokoyama, 530]: 1:57—slow ahead; 2:01—half speed; 2:04—slow speed; 2:06—full astern; 2:09—stop.

At 2:04 Captain Watanabe saw the white lights of the tug which he did not identify and it was then he reduced from half to slow speed [Watanabe, 343-344]. It was not until 2:06 that he saw the two white lights and, at approximately the same moment, the "dark object" ahead to the right [Watanabe, 346].

What was there, therefore, at 2:06 in the defective range light of the "FLEMING" which *contributed* to the collision? By Captain Watanabe's own testimony, the only factor resulting from possible "confusion" caused by the range light's visibility was to help cause him to *reverse* the engine of the "KOYEI MARU" and thus minimize the effect of collision.

Therefore, the fault specified could not have *contributed* to *cause* the collision. Certainly, it can be conjectured that if the master of the "KOYEI MARU" had not seen the range light of the "FLEMING" he *might not* have reversed, and that in such event he *might* have passed between the first and second scows over the towline. But this would be pure guesswork. The rule of *The Pennsylvania* and *The Beaver* cases, as we understand it, is that the statutory fault must be such that it may have contributed to *cause* the two vessels to intersect each other's courses.

If we had a single ship instead of the tug and tow (say the "QUEEN MARY") and a defective light merely caused another vessel to strike her in the stern, whereas if the

light had not been defective she would have struck in the bow, we would all agree that it mattered not where she struck.

What is the difference where we have a long tow and the colliding vessel strikes the second instead of the first barge in tow? Can we speculate in such situation and say the colliding vessel *might* have passed between the barges if it had not been for the defective light?

To express it another way, even if the defective range light did cause confusion in the mind of Captain Watanabe the *effect* of that confusion did not *contribute* to the collision. On the contrary it helped cause Captain Watanabe to take steps which undoubtedly lessened the effect of collision. If the "Fleming" showed only a stern light (the other factors remaining as the Court finds them) there is no reason to believe that the "Koyei Maru" would have taken even the step she did take to get under control.

For the foregoing reasons, petitioner respectfully requests that a rehearing be granted.

Dated: Los Angeles, California, May 31, 1938.

Respectfully submitted,

Ira S. Lillick,
John C. McHose,
Proctors for Petitioner.

I hereby certify that I am counsel for petitioner and that in my judgment the foregoing Petition for Rehearing is well founded in law as well as in fact and is not interposed for delay.

John C. McHose,
Proctor for Petitioner.